IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 5TH SEPTEMBER 2007 / 14TH BHADRA 1929

CRL.A.No. 992 of 2004()

SC.67/2001 of ADDL.SESSIONS COURT, THALASSERY
CP.7/2000 of JUDL.MAGISTRATE OF FIRST CLASS COURT, TALIPARAMBA
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APPELLANT:

KUZHIPLAKAL JOSEPH,
CONVICT NO.8467, CENTRAL PRISON,
KANNUR.

BY ADV. SRI.DEEPU THANKAN

RESPONDENT:

STATE OF KERALA, REPRESENTED BY A
PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

CRL.A.NO.992 OF 2004 (A)

Dated this the 5th day of September, 2007

J U D G M E N T

KOSHY,J.

Appellant in this case was charge sheeted for murdering one Kaliyaniyil Kutty @ Joseph. According to the prosecution, at about 10.30 a.m., on 9.11.1999, accused assaulted deceased Kutty due to some doubt that his wife has some illicit relationship with Kutty. The accused cut the said Kutty with a billhook with the intention to murder him and when the said Kutty ran off to escape, accused followed him and at the house compound of one Karthiyani the accused stabbed him on the chest, abdomen and other parts of his body with the intention to kill him and also with the intention to cause fatal injuries towards the body and the Kutty died due to fatal injuries inflicted by the accused on the same day. The defence of the accused in 313 Statement was that the deceased tried to molest the wife of the accused in the kitchen room of his house

and hearing the cry he rushed to the spot and when he intervened he ran away and he followed him to catch him to produce before legal authority. When he objected the deceased from raping his wife, accused attacked him and he is innocent. From the nature of the defence taken by the appellant, the recovery of the MO1 billhook used for inflicting injury and the fact that death was caused due to the injuries inflicted by MO1 are not seriously disputed. Therefore we are not going into the evidence regarding recovery of the billhook etc. in this appeal. To prove the prosecution case four eye witnesses were examined, PWs.1 to 4.

2. PW1 gave Ext.P1 F.I.Statement. PW1 in the F.I.Statement as well as in the deposition stated that he knew the deceased Kutty who is living about 1 km away from his house and accused who was living very near to the house of his wife. He saw the incident while he was working in the house of one Chandran. While he was doing the work, he heard a sound and when he looked he saw deceased was being followed by accused and they were running and blood was oozing from the head of the deceased. Both entered into the compound of one Chandran and at that time lunki of the deceased had loosen

and accused was having MO1 billhook in his hand. They ran to Karthiyani's house. By the time deceased fell down at the house compound of Karthiyani and the accused inflicted various cut injuries on various parts of the body of the deceased. The incident occurred at about 10.30 p.m. He also stated that he heard that there were some illicit relationship between the wife of the accused and deceased. He identified various material objects produced. He also stated that he was not aware when the incident started. He also stated that he heard that the deceased tried to assault the wife of the accused. He stated as follows:

Again he was asked regarding the incident. He stated that he cannot deny the statement that accused has inflicted injuries to save his wife from the deceased.

He also stated that he cannot deny whether the lunki of the deceased was taken from the house of the accused. He only saw that the lunki was loosen from the body of the deceased

and he saw it in the compound of Chandran.

3. PW2 is another occurrence witness. He heard a cry when he was returning from the shop to his house and he saw accused inflicting cut injuries on the deceased. He also stated that he heard accused stating that 'he will not be kept alive'. He saw the incident just four meters away from the place of occurrence. He also stated that when he alerted others, many neighbours came there. According to him, he was the first man who saw the incident. He also stated that he saw accused was inflicting cut injuries on the deceased and accused ran away taking billhook.

He and others took him to the hospital and on the way when he was asked kindly replied that it is a question of disbelief.

He also stated that accused was supposing that deceased has illicit relationship with the wife of the accused.

4. PW3 was also a neighbour who heard the sound of cry of the deceased. He came to the place of occurrence and at that time PWs.1 and 2 were there. He also saw accused inflicting cut injuries on the deceased and accused ran away from the place. According to him PWs.1 and 2 came earlier than him to the place of occurrence. PW4 is the last alleged occurrence witness, who is the sister of the Chandran. She also heard the sound when working in her house. She saw the struggle between deceased and accused in that compound and she saw accused inflicting one stab injury on the deceased and deceased ran away and accused followed him and at that time his lunki fell down. Later she understood that Kutty died. Hence prosecution story is that incident started near the house of one Chandran (PW4 is her sister). The accused inflicted first injury on the deceased and when deceased ran through the property of Chandran accused follow him and at the house compound of Kaliyani a fatal injury was inflicted. PWs.2 and 3 saw the incident only on the compound of Kaliyani. PW4 has

seen the incident in her compound.

5. Now we will come to the defence witness DW1. DW1, wife of the accused gave evidence supporting the statement of the accused in 313 Statement. According to her, on 9.11.1999, at about 10.30 a.m., while she was working in the kitchen, deceased came there and deceased caught hold of her and hearing the sound, accused who was doing the work in the next compound came there and tried to separate them and there was scuffle occurred between them and deceased kicked down the accused and ran away and accused followed him. She deposed as follows:

She also added that if accused had not come, the deceased would have raped her. In cross examination also she stated that deceased did not rape her because her husband saved her. Honourable Apex Court in ***Munshi Prasad and others***

v. State of Bihar (AIR 2001 SC 3031) held that defence witnesses are to be treated on par with prosecution witnesses. In ***State of Haryana v. Ram Singh (JT 2002 (1) SC 273)*** it was held that defence witnesses can be believed if it is credible. It is for the court to consider the version after considering all relevant matters. Here DW1 is the wife of the accused. Notwithstanding she would support her husband. But she was the only person in the house other than the accused and deceased when the incident started. Hence her deposition assumes importance because none of the prosecution witnesses were able to say the genesis of the incident. Accused was taken to the Police Station by the C.I. of Police and accused also got the injuries as can be seen from Ext.P7 wound certificate making the case of the accused a probable one:

> "The contused abrasion c darkened blood crusted over on the recital aspect. Rt ankle, outer aspect of Lt ankle.
>
> Greges over a contusion on the back of left shoulder."

None of the prosecution witnesses has stated that accused got injuries by falling down while running or following the

deceased. All witnesses saw the incident after hearing the cry from the place near Chandran's house and according to PW4, there was a scuffle in the compound and first cut injury was inflicted at that compound. According to PW1 there was already bleeding injury and they were running. PWs.2 and 3 saw the inflicting of injuries in the final stage. Ext.P15 Plan will show that according to the prosecution, first injury started at point 'B' which is only 33.5 meters away from the house of accused. It is 87 meters away from Chandran's house marked as 'G' and the next incident happened on point 'F' which is 37 meters away from point 'B' and PWs.1 and 4 saw the first incident inflicting injury by seeing in point 'G' and thereafter fatal injuries were inflicted at point 'K' near Karthiyani's house which is about 300 metres away from point 'B'. This also shows that the incident started from the house of the accused and the witnesses PWs.1 to 4 have no idea about the genesis of the incident. They could not deny the suggestion put to them that incident followed only when accused prevented deceased while attempting to molest her in the kitchen room.

6. The post mortem certificate shows the following ante-mortem injuries:

Injuries (Ante mortem):

1. Incised penetrating wound 5 cm long, oblique, on the front of chest the inner lower sharply cut end being 4 cm to the left of midline at the lower end of sternum and ending in a tailing, 8 cm long, directed downwards and to the right, the other end showed contused margins. The wound entered the chest cavity through the 5th intercostal space and terminated by puncturing the right ventricle near the apex. The wound was directed downwards, backwards and to the right for a total minimum depth of 2.5 cm.

2. Incised penetrating wound 6 cm long, oblique on the front of chest the upper inner split end being 1.5 cm to the left of midline and 5 cm above the lower end of sternum; the other end was sharply cut. The wound entered the chest cavity through the 4th intercostal space by cutting the muscles and 4th rib. Internal organs were not injured.

3. Incised penetrating wound 3.5 cm long horizontal on the left side of chest, the inner sharply cut end being 11 cm below the left nipple. The other end was contused. The wound entered the chest cavity through the 7th intercostal space, transfixed the left lobe of liver and terminated on the front wall of the stomach by making a superficial cut. The wound was directed downwards, backwards and to the right for a total minimum depth of 3.4 cm. Left chest cavity contained 250 ml. of blood and the abdominal cavity contained a handful of blood.

4. Incised wound 4 x 0.5 x 1 cm. horizontal in the right flank.

5. Incised wound 10 x 5 cm. on the front of left forearm 6 cm. below elbow.

6. Incised wound 18 x 5 cm. involving the inner and

back aspects of left forearm cutting the tendons and ulnar artery underneath.

7. Incised wound 12 x 4 cm. muscle deep at the back aspect of left upper arm, just above the elbow.

8. Incised wound 5 x 1 cm. oblique on the right parietal eminence; the skull underneath showed a cut injury involving the outer table only.

9. Incised wound 3 x 1.5 cm. at the root of right little finger at its back; the bone underneath was cut into two.

It is argued that hearing the cry of the wife, accused came rushing to the kitchen and he saw deceased catching hold of his wife for raping her and he tried to prevent it. There was a scuffle occurred and deceased ran away and accused followed him and probably by using MO1 which is used in the kitchen the incident had occurred. It is a highly probable version. He was suddenly provoked and we cannot measure the anger of the deceased in golden scale. But he has caused such bodily injuries which are likely to cause death. We are of the view that appellant is entitled to the benefit of exception IV of Section 300 of the Indian Penal Code as his version that seeing that deceased is attempting to rape his wife he tried to rescue her following in a sudden fight without premeditation and in the

heat of passion, upon a sudden quash incident occurred. Hence accused is liable to be convicted to culpable homicide punishable under Section 304 Part I of the I.P.C. Hence his conviction and sentence under Section 302 are set aside. So he is sentenced to Imprisonment for nine years and a fine of Rs.2,000/- for the offence punishable under Section 304 Part I of I.P.C. In default of the payment of fine, he is liable to undergo imprisonment for another two months. Appeal is allowed partly.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

prp

J.B.KOSHY & K.HEMA, JJ.

CRL.A.NO.992 OF 2004 (A)

J U D G M E N T

5th September, 2007